APR 13 1972

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-853.

STANLEY M. GREENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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WILLIAM T. COLEMAN, JR.,
JOHN R. MCCONNELL,
Attorneys for Petitioner.

Of Counsel:
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Petitioner, Stanley M. Greenberg, pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States and upon the grounds provided for in said Rule, files this Petition for Rehearing from the Denial of his Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, and in support thereof states as follows:

1. On December 31, 1971, Petitioner filed a timely Petition for a Writ of Certiorari.

2. This Court on March 27, 1972, denied the Petition.

3. Petition has not abandoned any of the issues raised in the Questions Involved in his Petition for a Writ of Certiorari (Petition, pp. 2-3), but this Petition for Rehearing is limited to matters not fully pointed out in the original Petition and the citation of a recent decision of the D. C. Circuit which conflicts directly with the decision below.

4. As stated in the Petition for a Writ of Certiorari (p. 22), after a day of deliberation the jury herein reported the following morning that it had reached a verdict as to two defendants (Alper and Feiner) but was "hopelessly deadlocked" as to Petitioner. The judge accepted the verdict of "guilty" with respect to the defendant Alper on all counts and "not guilty" with respect to the defendant Feiner on all counts.

The district judge then told the jury he was considering further instructions with respect to Petitioner and sent the jury back to the jury room, stating that it would be brought back in a "very short time." (A. 642). This occurred at 10:35 a.m. At 1:10 p.m. the judge sent a note to the jury telling it to continue its deliberations (A. 646-647). At 2:45 p.m. the jury was brought back and given a supplemental instruction which was in effect the so-called *Allen* charge[1] (A. 654-656). Less than an hour and ten minutes later the

1. *Allen v. United States*, 164 U. S. 492.

jury announced that it had reached a verdict with respect to Petitioner (A. 656-657). It found Petitioner guilty as to Count 1, the conspiracy count, despite the fact that all the overt acts in the conspiracy were those listed in Counts 2 through 21, as to which the jury found Petitioner "not guilty." Some evidence of the confusion wrought by the *Allen* charge, combined with the prejudicial disadvantage of the shotgun effect of a conspiracy trial, is shown by the fact that the verdict slip in Petitioner's trial (attached to this Petition as Appendix A p. 7 *infra*) shows that it was at some point marked "not guilty" on *all* counts (A. 53; App. 41a). In fact, when the verdict was returned, the trial judge stated: "I must say for the record, the court is very concerned with this verdict. I now show it to all counsel. I don't know what it means, very frankly, as Count 1." (A. 660).[2]

Despite the presence of an *Allen* charge, the Third Circuit affirmed the conviction. This action is in direct conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit in *United States v. Thomas*, 449 F. 2d 1177 (D. C. Cir. 1971). In the *Thomas* decision, in contrast to the Third Circuit decision in *United States v. Fioravanti*, 412 F. 2d 407 (3d Cir. 1969) and in this case below, the District of Columbia Circuit by a 2 to 1 vote reversed a conviction even without any finding that the *Allen* charge was coercive or prejudicial. The rule in the Third Circuit would thus appear to be that Petitioner must show that the *Allen* charge was coercive or prejudicial when used in the particular circumstance of his trial, whereas the rule in the D. C. Circuit is that use of the *Allen* charge is *per se* erroneous, requiring a reversal of conviction. In

2. The Government states that "the change on the slip . . . *might just as well* have indicated a clerical error." Govt. Brief, p. 7, fn. 5. Thus it would have Petitioner's career and life destroyed by a speculation. Reasonable doubt should be removed by a new trial.

his Petition for a Writ of Certiorari, Petitioner did not call this Court's attention to the *Thomas* decision in the D. C. Circuit. Thus, the existence of a real conflict has been overlooked by this Court. This conflict between the circuits can be resolved only by a decision of this Court.

5. It is conceded that on at least two occasions, after the jury began to deliberate, it came back for additional instructions. These instructions were developed and given to the jury without the presence of Petitioner, who is himself a lawyer and, indeed, at the time of the trial a distinguished judge. It is clear that this procedure violated both Rule 43 of the Federal Rules of Criminal Procedure and Petitioner's Sixth Amendment right to be present at all stages of the proceedings. The court below disposed of this violation by hypothesizing that since Petitioner's counsel was present, a waiver of Petitioner's right to be present must be implied. In addition, the court below, and the Solicitor General in his response to the Petition, seek to defuse the procedural and constitutional error by calling it "only" harmless error,"—Petitioner, they say, did not specifically detail what he would have done if he had in fact been present.

To the extent the decisions below relies on waiver, it conflicts directly with the decision of this Court in *Johnson v. Zerbst*, 304 U. S. 458 at 464, holding that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights . . . ." It also conflicts directly with *United States v. Crutcher*, 405 F. 2d 239 (2d Cir. 1968), which held that no waiver by a defendant can be implied, even by the presence of his counsel, unless it is first shown that counsel has explained the factual and legal ramifications to the defendant. It is clear on the record that Petitioner's counsel never informed him of these crucial events. Petitioner only learned of these additional

proceedings (from which he was absent) eight months after the trial was over. The record also shows that Petitioner was physically available. Thus footnote 4 of the opinion of the court below, though facile, is simply contrary to the facts.

Finally, if "harmless" error, but error nonetheless, is the crux of the decision below, it would be tragic for this Court to refuse Petitioner the opportunity to vindicate himself on a record free from error. He has enjoyed an exemplary career at the bar before the present charges were brought and an exemplary career on the bench. Even now he continues to discharge important public responsibility, as the attached newspaper articles reveal. See Appendix B, *infra*, pp. 8-11. To have such a man's career turn on a theory of "harmless" error flies in the face of the sound principles set forth in *Chapman v. California*, 386 U. S. 18, 24 (1967) and most recently expressed by the opinion of Mr. Justice Marshall, joined by Mr. Justice Douglas and Mr. Justice Brennan, in *Schneble v. State of Florida*, 40 U. S. L. W. 4299, 4301 (March 21, 1972) (dissenting opinion).[3]

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3. Petitioner realizes that usually four Justices must vote in favor of a grant of a petition for writ of certiorari. We recall, however, the statement of former Chief Justice Hughes that often he voted in favor of a writ of certiorari when he realized that three other justices had expressed their opinion that the law should be contrary to that which the majority had expounded in another case. We submit that the whole question of when "harmless error" should foreclose review is so unsettled and of such serious consequences in the administration of justice that this matter should be explored by the present Court which has two new members who did not participate in the *Schneble* case.

CONCLUSION.

Wherefore, it is prayed that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE.

William T. Coleman, Jr., being a member of the bar of this Court certifies that this Petition for Rehearing raises and points up matters not clearly set forth in the Petition for a Writ of Certiorari previously filed as it now for the first time points out a conflict between the decision in the Third Circuit and that in the District of Columbia Circuit with respect to the *Allen* charge and that such Petition for Rehearing is not filed for purposes of delay but because Petitioner and his counsel feel that there is good cause therefor.

/s/ WILLIAM T. COLEMAN, JR.,
William T. Coleman, Jr.

Dated: April 12, 1972.

STANLEY M. GREENBERG

COUNT	DESCRIPTION	VERDICT	
	ALL COUNTS	NOT GUILTY	
		GUILTY	
I	Conspiracy Indictment pp. 1-18	NOT GUILTY	CR
		GUILTY	
II	Mail Fraud - 4/27/65 Indictment pp. 19-38	NOT GUILTY	X
		GUILTY	
III	Mail Fraud - 4/28/65 Indictment p. 39	NOT GUILTY	
		GUILTY	
IV	Mail Fraud - 5/3/65 Indictment p. 39	NOT GUILTY	
		GUILTY	
V	Mail Fraud - 5/6/65 Indictment p. 40	NOT GUILTY	X
		GUILTY	
VI	Mail Fraud - 5/13/65 Indictment p. 40	NOT GUILTY	X
		GUILTY	
VII	Mail Fraud - 5/6/65 Indictment p. 41	NOT GUILTY	X
		GUILTY	
VIII	Mail Fraud - 5/14/65 Indictment p. 41	NOT GUILTY	
		GUILTY	
IX	Mail Fraud - 5/18/65 Indictment p. 42	NOT GUILTY	X
		GUILTY	
X	Mail Fraud - 6/17/65 Indictment p. 42	NOT GUILTY	X
		GUILTY	
XI	Mail Fraud - 6/17/65 Indictment p. 43	NOT GUILTY	X
		GUILTY	
XII	Mail Fraud - 6/17/65 Indictment p. 43	NOT GUILTY	X
		GUILTY	
XIII	Mail Fraud - 6/23/65 Indictment p. 44	NOT GUILTY	X
		GUILTY	
XIV	Mail Fraud - 6/23/65 Indictment p. 44	NOT GUILTY	X
		GUILTY	
XV	Mail Fraud - 6/29/65 Indictment p. 45	NOT GUILTY	X
		GUILTY	
XVI	Mail Fraud - 6/30/65 Indictment p. 45	NOT GUILTY	X
		GUILTY	
XVII	Mail Fraud - 6/30/65 Indictment p. 46	NOT GUILTY	X
		GUILTY	
XVIII	Mail Fraud - 6/30/65 Indictment p. 47	NOT GUILTY	X
		GUILTY	
XIX	Mail Fraud - 11/20/64 Indictment p. 47	NOT GUILTY	X
		GUILTY	
XX	Mail Fraud - 12/18/64 Indictment p. 48	NOT GUILTY	X
		GUILTY	
XXI	Mail Fraud - 3/5/65 Indictment p. 48	NOT GUILTY	X
		GUILTY	

Arbiters Save Trial Time, Judge Says

Common Pleas Court Judge Stanley M. Greenberg predicts the waiting period for civil suits coming to trial will be reduced to a year by 1973 as a result of a new compulsory arbitration program.

Judge Greenberg, who directs the program, reported on its progress yesterday.

Before the program was started last year, the waiting period averaged 4½ years, Judge Greenberg said.

The program requires that all cases valued below $10,000 be submitted to compulsory arbitration by a panel of three lawyers. This replaces trial by judge and jury.

Shift in Cases

When the $10,000 system went into effect it caused a shift of some 5,000 cases into the program from the civil jury list. This created an almost instant backlog.

This led former Philadelphia Bar Association chancellor John R. McConnell to urge members of the association to volunteer their services free for one round of cases in order to cut into the backlog.

Although some 900 lawyers volunteered for the program it was discovered most of them were sitting on cases in the $5,000 to $10,000 range. These cases were considered more time-consuming and complex than the lower valued cases in the old program.

1,200 Cases a Month

Current thinking among judges is to mold the volunteers into regular panels so they can be paid as arbitrators at the rate of $30 a case and $50 for the chairman.

The compulsory arbitration program currently disposes of 1,200 civil cases a month, Judge Greenberg said. As a result the backlog is being reduced by 200 cases a month or about 2,400 cases a year.

Arbitration of a single case costs the court $110 as compared to $700 per day for a full-blown court jury trial, said Judge Greenberg.

Phila Inq - 3/4/72

Arbitration Solves 1,200 Cases a Month

The compulsory arbitration program of Common Pleas Court is disposing of an average of 1,200 civil cases a month, it was announced Friday.

Common Pleas Court Judge Stanley M. Greenberg said the disposal rate is much greater than the incoming rate of new cases.

The judge estimated that some 900 new cases are coming in each month for disposition under the program.

At one time, the arbitration panel method dealt with civil cases involving up to $3,000. But the court section now has jurisdiction up to $10,000.

As of January, the court had 10,669 cases ready for action by three-man panels of arbitrators.

Last year, Judge Greenberg reported the court disposed of 12,557 cases. Only 5.4 percent of the cases went into the regular Common Pleas Court on appeal.

JUDGE GREENBERG
. . . 900 new cases

The jurisdiction of the program was expanded as a means to cutting back on the regular civil list which goes to the Common Pleas courts. Many of these cases require a jury.

There are now more than 2,700 arbitrators available for the cases. The chairmen of the three-man arbitration panels gets $50 and the other two members $30 each for hearing the case.

Greenberg Works Hard, Sans Bench or Paycheck

By DAVE RACHER and JOE CLARK

Each morning at 7:45 sharp, Stanley M. Greenberg shows up at his place of business, sheds his coat and goes to work. Long after some fellows in the same profession have called it a day, Greenberg is still at it. He works through lunch and into dinner.

Greenberg used to get $30,000 a year for the job.

Now he does it free.

Greenberg was once a Common Pleas Court judge. But that was before a Federal jury convicted him of conspiracy in a check-kiting scheme which involved two other men, $200,000, and happened before his appointment to to the bench. He was later sentenced to six months' probation.

STANLEY M. GREENBERG
. . . 10-hour days

Following Greenberg's conviction in April, 1970, the State Supreme Court said Greenberg could no longer sit on the bench and took away his robes. The high court will keep the robes until Greenberg exhausts all appeals to the lone charge of conspiracy. He was acquitted of 20 other charges.

"I FEEL EVENTUALLY I will be vindicated," said the 52-year-old Greenberg the other day at his office on the sixth floor of City Hall.

Despite his derobing, Greenberg still functions as he did during the period after his conviction and before he was removed from the bench. He continues to oversee the operation of the arbitration program he set up during his give years as a judge, and is often called upon by other jurists for advice and guidance.

Some feel Greenberg is one of the most knowledgeable man in the city when it comes to civil cases. He is credited with cutting the backlog in civil case trials from a 4½-year waiting period to a little over one year.

He has done this by getting up a three-member arbitration panel which rules on all settlements under $10,000.

Common Pleas Court President Judge D. Donald Jamieson recently offered Greenberg a position created just for him: court administrator for civil cases.

GREENBERG REFUSED the offer, saying, "I don't think it's a good idea at the present time. I don't want to be paid for anything but being a judge."

The U.S. Court of Appeals here has turned down a motion for a new trial, and is now considering Greenberg's petition for reargument.

"All I ask," he says, "is to be treated with the same objectivity as an alleged Mafia chieftain in another case."

Greenberg has been off the state payroll for several months. He's living off his savings and borrowing. He admits he can continue this way "for another few months."

Asked why he puts in a 10-hour-plus day, 5 days a week, without getting paid a cent, Greenberg answered: "I have nothing else to do."

Greenberg Sees Cases Pile Up, Strains to Get Back on Bench

By DAVE RACHER
and NELS NELSON

The courts in City Hall have many peculiarities but one of the oddest of all is that the hardest-working judge on the premises, in the opinion of some, is a judge who is barred from sitting on the bench.

Common Pleas Judge Stanley M. Greenberg, white-haired and distinguished-looking and a man of tireless energy at the fairly tender judicial age of 52, is often at work in his chambers as early as 8 A. M. He rarely leaves before 5:30 in the afternoon.

"No question about it," said a man whose work takes him into the courts every day. "Judge Greenberg is one of the best judges in City Hall."

JUDGE GREENBERG must spread his legal talents very thin these days. He is limited to tying up the loose ends of civil cases that were tried before him prior to last April 29—the day a U. S. District Court jury convicted him of conspiracy to commit mail frauds in a $200,000 check-kiting scheme.

The judge is awaiting the outcome of appeals on his conviction. There is a body of opinion that believes he should not be involved in any court business whatever during this period. The board of governors of the Philadelphia Bar Association has, nevertheless, given Judge Greenberg's limited duty its blessing.

THE JUDGE remains on the public payroll. A judicial review board currently is weighing the matter of what his status should be until his motions for a new trial are ruled on in Federal court — probably within the next 6 weeks.

In the meantime, Judge Greenberg scrupulously spells out his touchy situation to every lawyer and every lawyer's client involved in his unfinished civil business.

He says that not one person has elected to have him withdraw because of the unusual personal circumstances. In fact, he professes to be agreeably surprised that so large a body of the public is not even aware of his special problem.

THERE IS no doubt that Judge Greenberg's voracious appetite for courtroom work is missed by his colleagues of the bench.

Judge STANLEY M. GREENBERG
. . . seeking new trial

He was a central figure in the Civil Court program. Between September 1967 and last spring, he was instrumental in chopping away at the court backlog to the extent that some 6000 cases were chipped out of the pending file. Since his enforced limited duty took effect, the backlog has again crept steadily upward.

"It's made me very frustrated," he said the other day, "because I can see what's happening and I can't do anything more than handle administrative work."

Judge Greenberg said he is "confident that at some point" his name will be cleared.

"I know better than anybody what I did, and I know I didn't do anything wrong." people who know me, and who have gotten to know me, also are aware of that."

The offense of which he was convicted dated from prior to his elevation to the bench in 1965.

Judge Greenberg said that his mental burden, shared by his wife Clair and their two sons, has been eased by many expressions of support.